

2011 WL 1152338 (E.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. California.

Norman PIMENTEL, Plaintiff,

v.

COUNTY OF FRESNO and Does 1 through 25, inclusive, Defendants.

No. 1:10-CV-01736-OWW-DLB.
January 10, 2011.

**Plaintiff's Opposition to Motion of Defendants to Dismiss Plaintiff's Complaint
or to Strike Allegations of Regulatory Violations and Attorney's Fees**

Joel M. Murillo, Esq. 101143, 311 East Merced Street, Fowler, California 93625, Telephone: (559) 834-9900, Facsimile: (559) 834-9901, Attorney for Plaintiff Norman Pimentel.

Honorable Oliver W. Wanger, Judge of the United States District Court.

DATE: January 24, 2011

TIME: 10:00 a.m.

Court Room 3

Plaintiff responds as follows:

Plaintiff points out that he inartfully pleaded his complaint, but denies each of Defendants' contentions.

1. DEFENDANTS VIOLATED MANDATORY AND CLEARLY ESTABLISHED DUTIES; THEREFORE; QUALIFIED IMMUNITIES ARE SURMOUNTED; THE CAUSE OF ACTION PER 42 USC §1983 IS VALID; AND ATTORNEY'S FEES MAY BE AWARDED ALSO.

First, Plaintiff contends that Defendants had a mandatory and clearly established duty as a "care custodian" to care for Plaintiff who is an **elder**, and had a mandatory duty to provide emergency and continuing medical care pursuant California Government Code §845.6(d) §844.6(d); G.C. §831.8(d) and Title 15. (Reference is made here to the California Welfare and Institutions Code §§ 15600, The **Elder Abuse** and Dependent Adult Civil Protection Act (hereinafter "the **Elder Abuse Act**")). Plaintiff was over 65 years of age when he was brought into the jail for violating probation; so, he was an **elder** per the **Elder Abuse Act** at §15610.27. The County is a care custodian, for example, under the **Elder Abuse Act**, §15610.17(y), wherein a care custodian includes an administrator or employee of a public entity providing care or services for **elders**. Care for Plaintiff as an **elder** was mandatory for Defendants per the **Elder Abuse Act** at § 15610.07(a) and (b): that define **abuse** of an **elder** as follows:

(a) Physical **abuse**, neglect, ..., abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering [; or] (b) the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

Per the **Elder Abuse Act** at § 15610.57(b)(2) and (3), the County was negligent for failure to provide for Plaintiff's medical care and failure to protect from health and safety hazards. *Intrieri v. Superior Court* (2004) 117 CalApp4th 72; 12 CalRptr3d 97, held as follows:

we find that petitioner's evidence was sufficient to create a triable question of fact as to whether Guardian's conduct with respect to Mrs. Intrieri's [pressure sores](#) constituted a reckless failure to provide medical care for her physical health needs... we conclude that triable questions of fact exist as to the reckless neglect element of the cause of action for [elder abuse](#), and therefore summary adjudication should not have been granted, (at 117 CalApp4t at 85.)

In reaching its holding, the *Intrieri* court noted as follows:

The elements of a cause of action under the [Elder Abuse](#) Act are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against [elder abuse](#) and neglect. (See [Delaney v. Baker](#) (1999) 2 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] Therefore, '[w]here it is proven by clear and convincing evidence that a defendant is liable for physical [abuse](#) as defined in Section 15610.63, neglect as defined in Section 15610.57...and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this [abuse](#), in addition to all other remedies otherwise provided by law ... [t]he court shall award to the plaintiff reasonable attorney's fees and costs.' (§15657; [Marron v. Superior Court](#), *supra*, 108 Cal.App.4th at p. 1058, 134 Cal.Rptr.2d 358). *Intrieri* 117 CalApp4th 72, at 82.

Secondly, Plaintiff was a prisoner in the Fresno County Jail; therefore, a special relationship existed between Plaintiff and the County pursuant to.

Finally, in [Estelle v Gamble](#), 429 US, at 103-104, 50 L Ed 2d 251, 97 S Ct 285, the Supreme Court of the United States concluded: "deliberate indifference to serious medical needs of prisoners" violates the [eighth] Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency." ([Estelle v Gamble](#), 429 US, at 103-104.)

In [Walker v. Benjamin](#), 293 F.3d 1030 (7th Cir. 2002), it was found that the alleged intentional refusal to treat a prisoner's pain by denying the prisoner the pain relief medication prescribed to him by his surgeon, following his hand surgery for serious bone infection, were not entitled to qualified immunity for their alleged conduct, in the prisoner's 42 USC §1983 claim for deliberate indifference to his untreated pain, under the Eight Amendment; and the standard for refusal to treat prisoner's pain arising from serious medical condition was well-established at time that prisoner was allegedly denied medication.

In this action, Plaintiff avers that not only was he subjected to being assigned to a cell with bunk beds where it was foreseeable that he might fall given his age, medication and health and mental conditions, but that every prisoner with the same problems was subjected to the same as a custom, pattern and practice of the County and its administrator. Moreover, being subjected to this civil rights violation arising from inadequate medical treatment was known by the County and its administrator as inmates had constantly complained of the offending procedure or practice of denying medical care. This custom, practice or procedure created unreasonable risk of inadequate medical treatment; the defendants were aware that the unreasonable risk of injury existed and that treatment was being denied to inmates in the same category as Plaintiff including Plaintiff as he had constantly sent notices to the administrator; but the defendants were indifferent to that risk and lack of treatment; and obviously after Plaintiff's fall, there were several failures to provide adequate medical treatment; especially in the period from April 25, 2009 to April 30, 2009 when Plaintiff was dragged to court, returned to his cell, and left to plead for help. This resulted from failure to employ an emergency practice or procedure to determine Plaintiff's true medical condition. This was cruel. [[U.S.C.A. Const.Amend. 8](#); 42 U.S.C.A. § 1983. [Andrews v. Camden County](#), 95 F. Supp. 2d 217 (D.N.J. 2000)]. In this action there was a deliberate indifference to serious medical needs of Plaintiff constituting unnecessary and wanton infliction of pain proscribed by Eight Amendment, and this includes indifference manifested by the prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed. ([Erickson v Pardus](#) (2007, US) 127 S Ct 2197, 167 L Ed 2d 1081; [California Government Code §845.6\(d\) §844.6\(d\)](#); G.C. §831.8(d).)

2. THE COMPLAINT RELATES BACK:

Federal Rule of Civil Procedure 15c)(1)(A) provides that an amended complaint is valid where relates back to the original operative facts as pleaded in the original complaint. This issue was the subject of an order made on August 25, 2010, by the state court that held the complaint amended therein was valid as it related back to the original complaint; therefore, since this complaint is the one filed in state court, it is valid. (*Please see, for example, Martell v. Trilogy, Ltd.* (9th Cir 1989) 872 F2d 322, 325 [common core of operative facts; i.e., the same conduct, transaction or occurrence].)

3. CONCLUSION

For the foregoing reasons, the Plaintiff prays that the court deny Defendants' motion to dismiss and to strike parts of the complaint.

Dated: January 10, 2011

Respectfully submitted,

Joel M. Murillo,

Attorney for Plaintiff

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